93-284
No. _____



In The
# Supreme Court of the United States
October Term, 1993

SECURITY SERVICES, INC.,
*Petitioner,*
v.
K MART CORPORATION,
*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## PETITION FOR WRIT OF CERTIORARI AND APPENDICES

PAUL O. TAYLOR
2950 Metro Drive
Suite 301
Minneapolis, MN 55425
(612) 854-3996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED FOR REVIEW

In an action by a motor common carrier to collect its tariff charges may the Interstate Commerce Commission declare the carrier's filed distance rate tariff retroactively void solely because the carrier failed to comply with ICC regulations for the determination of distances?

## LIST OF PARTIES

Petitioner Security Services, Inc. (hereinafter "Security") is a corporation previously engaged in common carrier transportation of freight in interstate commerce under the name Riss International Services. Respondent K Mart Corporation (hereinafter "K Mart") is a corporation engaged in retail sales.



## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Page

CASES





# TABLE OF AUTHORITIES – Continued

Page



STATUTES

TABLE OF AUTHORITIES – Continued



No. _____

In The

# Supreme Court of the United States

October Term, 1993

SECURITY SERVICES, INC.,

*Petitioner,*

v.

K MART CORPORATION,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## PETITION FOR WRIT OF CERTIORARI AND APPENDICES

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 62 U.S.L.W. 2011 and reprinted at Appendix B. The order and decision of the United States District Court for the Eastern District of Pennsylvania (Van Artsdalen, J.) granting summary judgment for Respondent, is unreported and is reprinted as Appendix A.

## JURISDICTIONAL BASIS

The judgment of the United States Court of Appeals for the Third Circuit was dated, filed and entered on June 18, 1993. This court has jurisdiction under 28 U.S.C. sec. 1254(1). The petition herein was timely filed pursuant to 28 U.S.C. sec. 2101(c).

## STATUTES INVOLVED

49 U.S.C. sec. 10761. Transportation prohibited without tariff.

> Except as otherwise provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff.

49 U.S.C. sec. 10762. General tariff requirements.

* * *

> (e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.



## STATEMENT OF THE CASE

Security Services, Inc. ("Security") was a motor common carrier operating pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission ("ICC"). Security operated under Title 49 of the United States Code which governs transportation in interstate commerce.

Pursuant to 49 U.S.C. sec. 10762(a) Security published a tariff containing rates, *inter alia*, stated in cents per mile and filed it with the ICC. The filed tariff specified that a distance guide published by Household Goods Carriers Tariff Bureau and filed with the ICC was to be utilized for a determination of distances. Security failed to follow ICC regulations set forth at 49 C.F.R. sec. 1312.4(d) requiring it to provide the publisher of the distance guide with a current power of attorney at the time of the shipments at issue in this case. Security brought a civil action against K Mart Corporation ("Kmart") to collect freight charges based upon this filed tariff.

On September 9, 1992, the United States District Court for the Eastern District of Pennsylvania entered summary judgment in favor of K Mart and against Security On June 18, 1993 the court of appeals affirmed the district court finding that the ICC could, by its regulations, retroactively declare tariffs void due to failure to provide the publisher of the distance guide with a power of attorney.

## I. REASONS FOR GRANTING THE WRIT.

### A. The Opinion Below Is Inconsistent With This Court's Previous Opinions Interpreting The Tariff Rejection Provisions Of The Interstate Commerce Act.

One of the many requirements of the Interstate Commerce Act is that motor common carriers subject to ICC authority may provide regulated services only pursuant to tariffs filed with the Commission. 49 U.S.C. sec. 10761(a). Common carriers are specifically forbidden to provide such services in the absence of tariffs and "may not charge or receive a different compensation" than the rate specified in the tariff. 49 U.S.C. sec. 10761(a). By requiring filed tariffs and strict compliance with them, the Act seeks to avoid unjust discrimination and to give shippers an advance opportunity to challenge proposed rates. To achieve this protection, the Act provides explicit procedures, remedies and penalties.

Chronologically, the first step in fixing a new rate, or changing an existing one occurs when the motor common carrier files with the Commission a new tariff, which may not take effect until a specific advance notice period has elapsed. 49 U.S.C. sec. 10762(c)(3). A subdivision of the same section that governs tariff filings provides that the Commission may reject such a "submitted" tariff if the tariff "violates this section or a regulation of the Commission carrying out this section." 49 U.S.C. sec. 10762(e). If the Commission accepts the tariff for filing, the next step under the statutory plan allows the Commission to suspend the effectiveness of the new tariff – before it becomes effective – for a period of seven months after the



tariff would otherwise go into effect and to commence an investigation into its lawfulness. 49 U.S.C sec. 10708(b).

**The suspension period is limited, however, to a specified time period after which the tariffs go into effect if the Commission has not completed its inquiry.** At the end of the investigation, the Commission can also prescribe new rates for the future if the filed tariff is found to be unlawful. 49 U.S.C. sec. 10704.

If the tariff goes into effect, the shipper may, at any time, file a court complaint for overcharges, i.e. payment of charges in excess of the filed tariff pursuant to section 11706(b). Alternatively, the shipper can sue for damages under 49 U.S.C. sec. 11705(b)(3) and 49 U.S.C. sec. 11706(c)(2) if the carrier has collected the published tariff rate but that rate is unlawful under the substantive standards of the Act (e.g., because it is unreasonably high). *Reiter v. Cooper,* 507 U.S. ___, 122 L.Ed.2d 604 (1993)

The opinion below is patently inconsistent with the foregoing statutory plan because it fails to give legal effect to a filed tariff as required by 49 U.S.C. sec. 10761(a). The carrier's filed tariff was never rejected by the Commission upon filing as pursuant to sec. 10762(e). The Commission never suspended Petitioner's tariff pursuant to 49 U.S.C. sec. 10708(b). Respondent has never commenced an ICC proceeding to determine the rate to be applied in the future pursuant to 49 U.S.C. sec. 10704, nor has Respondent commenced a civil action for damages incurred by Petitioner's reference to the distance guide in its filed tariffs, pursuant to 49 U.S.C. secs. 11705(b)(3) and 11706(c)(2).

The opinion below collaterally reviews and gives legal effect to 49 C.F.R. sec. 1312.4(d) which declares a filed tariff "void as a matter of law" where that filed tariff refers to another filed tariff the publisher of which has not been furnished a power of attorney by the carrier. In essence the court below found that Security's *filed* tariff containing *filed* rates stated in cents per mile which *filed* tariff lists another *filed* tariff for computation of distances is retroactively void. This Court has held that the Commission has no general power to retroactively reject a *filed* tariff. *Interstate Commerce Commission v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984). Tariffs may be retroactively voided only where the Act provides a specific statutory mandate to the ICC and the retroactive voiding is closely tied to that mandate. *Id.* at 367.

The court below relied upon the decision by the United States Court of Appeals for the Fifth Circuit in *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 979 (1993). The "specific" statutory mandate to the ICC which the court in *Vitro* relied upon to retroactively void Petitioner's filed tariff is the National Transportation Policy as codified at 49 U.S.C. sec. 10101. However, the National Transportation Policy provides no specific mandate to the ICC.

In *Interstate Commerce Commission v. American Trucking Associations, Inc.*, 467 U.S. 354, *reh'g. denied*, 468 U.S. 1224 (1984), in an unanimous decision, it was held that 49 U.S.C. sec. 10762(e) (which authorizes the ICC to reject motor carrier tariffs if they violate statutory or regulatory requirements, such, for example, as 49 C.F.R. sec. 1312 concerning publishing and filing tariffs) does not confer upon the ICC the broad power to nullify filed tariffs



*retroactively*. When faced with the clear holding of this case, it is difficult to imagine how the ICC continues to maintain, as it did in *Jasper Wyman & Son, et al. – Petition for Declaratory Order*, 8 I.C.C. 2d 246 (1990) *reviewed sub nom. Overland Express, Inc. v. Interstate Commerce Commission*, 996 F.2d 356, *petition for rehearing docketed* August 6, 1993 (D.C. Cir. 1993), that the retroactive voiding provision of 49 C.F.R. sec. 1312.4(d) is valid and permits it to ignore filed tariffs. Although this Court in *American, supra*, in a 5-4 vote,[1] decided that the ICC had requisite authority to reject effective tariffs submitted in substantial violation of a rate-bureau agreement, limitation of this authority was confined only to those situations involving "a specific statutory mandate of the Commission . . . [upon which] the exercise [its] of power must be directly and closely tied to. . . . " *Id.*, at 367.

The ICC in *Jasper Wyman* has failed to identify any statutory mandate allowing it to treat as void a tariff which was indisputably on file. Plainly, 49 C.F.R. sec. 1312.4(d) was promulgated pursuant to 49 U.S.C. sec. 10762(b). Yet, 49 U.S.C. sec. 10762(b) is devoid of any provision governing a carrier's failure to comply with the formal manner of publishing tariffs required by that section. Instead, Congress established 49 U.S.C. sec. 10762(e) to govern rejection of tariffs, wherein it is succinctly stated that: "The Commission may reject a tariff submitted to it by a common carrier under this section if that

---

[1] In Part A of the opinion, this Court *unanimously* found that the ICC did not have retroactive authority based upon 49 U.S.C. sec. 10762(e) to nullify effective tariffs if they violated the ICC's tariff publishing regulations.

tariff violates this section or regulation of the Commission carrying out this section." Thus, it is evident from the clear reading of the statute Congress intended that *any* regulation concerning the rejection of tariffs promulgated pursuant to 49 U.S.C. Section 10762(b) was to be governed by 49 U.S.C. sec. 10762(e). Moreover, in *American* this court found that rejection power could not be used retroactively:

> [T]he language of subsection 10762(e) and the structure of the Commission's remedial authority under the Interstate Commerce Act (ICA) as amended, 49 U.S.C. Section 10101 et seq. persuade us that Congress could not have meant subsection 10762(e) to confer on the Commission a broad power to nullify effective tariffs retroactively.

*Id.*, at 361-62.

The ICC stated in *Jasper Wyman* that it did not retroactively reject the carrier's tariff as void. 8 I.C.C. 2d 258. Rather, it claims the filed tariffs are not effective. This Court has, however, determined that where as here the Commission had already accepted the tariff as-filed, to interpret the ICC's power to *reject* a tariff as also including a license to *revoke* it, "would be contrary to the plain language of the subsection." *American*, 467 U.S. at 362. Moreover, this Court found that allowing retroactive rejection of filed tariffs under sec. 10762(e) would impermissibly afford the Commission far greater authority than is provided under 49 U.S.C. sec. 10704(b), relating to the Commission's authority to cancel effective tariffs and prescribe new rates for the future based upon a reparations finding.



In *American* it was also noted that since the Commission's power to suspend and investigate rate filings is limited to seven months after the proposed tariff's effective date and final action must be taken only after a full hearing (See 49 U.S.C. sec. 10708), to read 49 U.S.C. sec. 10762(e) as allowing retroactive rejection of effective rates would render the constraints of 49 U.S.C. sec. 10708 "nugatory." 467 U.S. at 363. Here the Commission has not explicitly rejected Security's tariff for failure to provide the publisher of the filed distance guide with a power of attorney before they became effective. Significantly, in order to distinguish *American*, the ICC found in *Jasper Wyman* that the carrier's distance rates were never "effective". However, in *American* it was stated clearly that "effective tariffs" means tariffs that are filed with the agency and have "gone into effect." *Id.*, at 360. The definition of "effective tariffs" is further clarified in footnote 4 of the *American* decision, wherein it is stated:

> Prior to 1979, the Commission had no need to reject *effective tariffs*, because the Commission's staff examined every filing prior to the *effective date* of the proposed tariff and if an obvious defect was discovered the tariff was rejected immediately. . . . Since then, the Commission has reviewed only a random sampling of tariff filings, and tariffs with obvious defects inevitably are *permitted to go into effect*. (Emphasis added).

*Id.* The Commission itself, prior to the *American* decision, had always held that a tariff which was submitted in a technically defective manner was "not a nullity" and the shipper's recovery was limited to actual damages. *See Boren-Stewart Co. v. Atchison, T. & S.F.R. Co.*, 196 I.C.C. 120

(1933); *Acme Pet Products, Ltd. v. Akron, C. & Y.R. Co.*, 277 I.C.C. 641 (1950). This Court in *American*, at footnote 7, not only cited these two cases with approval, but even adopted the statement from *Acme Pet Products* that "where tariffs are tendered to and accepted by the Commission, the rates therein become applicable, even though technically they should have been rejected upon tender." 467 U.S. at 364.

The Commission definition of an "effective" tariff in *Jasper Wyman* is consistent with the definition adopted by this Court in *American*, and the previous ICC decisions cited therein. In *Jasper Wyman* the Commission stated:

> These tariffs, although not complying with all of the tariff regulations *could be considered on file* because they had met the threshold requirement (i.e., they had been sent to the Commission and had not been rejected at the outset). [Emphasis supplied].

*Id.* at 259. Here, Security met the same standard: the Security distance rate tariff, including its provision incorporating the filed distance guide by reference, was on file with the Commission and had not been rejected at the outset. Thus it was effective under the Commission's own standard enunciated and ignored in *Jasper Wyman*. It is clear from *American* that the filed tariffs of Security are not to be disregarded or voided merely because of an irregularity in tariff filing requirements.

While it is clear that the ICC has no power pursuant to 49 U.S.C. sec. 10762 to retroactively reject effective rates, neither can Kmart find solace in Part B of the



*American* opinion allowing for rejection under the Commission's so-called "discretionary powers." These discretionary powers, however, derive from 49 U.S.C. sec. 10321(a) and are limited in application only when necessary to achieve other specific statutory goals. *Id.*, at 367. In *American* the other specific statutory purpose was to insure compliance with rate-bureau agreements (governed by a separate statutory provision that provided exemption from the antitrust laws). Here there is no provision of the Act relevant or even evident other than 49 U.S.C. sec. 10762, which deals with the Commission's general authority to prescribe rules and regulations concerning the filing of tariffs. Pursuant to *American* the Commission has no power or authority to retroactively enforce 49 C.F.R. sec. 1312.4(d), either in conjunction with, or as an adjunct to, 49 U.S.C. sec. 10762(e) through rejecting Security's filed tariff. In *Jasper Wyman* the Commission stated that the tariffs under attack in *American, supra*, could not be treated as void because they were filed (i.e. they had been sent to the Commission and had not been rejected at the outset). So here, Security's tariff had been sent to the Commission and not rejected at the outset. Thus under *American* it cannot be treated as void.

The Court of Appeals found 49 U.S.C. 10762(b) to be the specific statutory mandate authorizing the ICC to retroactively reject a filed tariff. Plainly 49 U.S.C. sec. 10762 cannot be used as a statutory mandate to retrospectively void Security's filed tariff. This is so because Congress established 49 U.S.C. sec. 10762(e) to govern *all* rejections of tariffs established under rules promulgated pursuant to sec. 10762. The language of sec. 10762(e) states:

> The Commission may reject a tariff submitted by a common carrier under *this* section if that carrier violates *this* section or regulation of the Commission carrying out *this* section. [Emphasis supplied].

Thus Congress clearly intended *any* regulation concerning the rejection of tariffs promulgated pursuant to sec. 10762 to be governed by subdivision (e) thereof. Thus, the court below erred by failing to find the specific statutory mandate other than sec. 10762 as required by this Court's decision in *American*.

This Court in *American* specifically found that sec. 10762(e) alone could not be used to retroactively void a filed tariff. Instead sec. 10762(e) is limited to rejections of tariff upon filing. Retroactive rejection of filed tariffs was allowed by this Court only when some other statutory mandate beside sec. 10762 existed. With respect to the second prong of *American*, that the retroactive rejection power be closely tied to the specific statutory mandate, the statute's paramount purpose is to provide open rates, known to all. The net effect of the retroactive rejection condoned by the Court below is to enable the carrier and shipper to enter into secret rate agreements thus instead actually frustrating the Act's paramount purpose. Indeed a motor common carrier and a shipper could secretly scheme to render a tariff void in order to provide a preference to the shipper by failing to provide the publisher of a referred to tariff with the power of attorney required by 49 C.F.R. sec. 1312.4.

It is clear from *American* that the filed tariffs of Security is not to be disregarded or voided merely because of an irregularity in tariff filing requirements. *See also, Davis*



*v. Portland Seed Co.*, 264 U.S. 403 (1924); *Berwind-White Coal Mining Co. v. Chicago and E. R.R.*, 235 U.S. 371 (1914).

In *Davis*, this Court held that the illegality of the filed tariff did not void its application. "The statute requires rigid observation of the tariff without regard to the inherent lawfulness of the rates specified. . . ." *Id.*, 264 U.S. at 404. Likewise, here the Act requires adherence to Security's filed distance rate tariff despite the failure by Security to provide the publisher of the distance book referred to in Security's tariff with a power of attorney.

In *Berwind*, as here, the shipper challenged the carrier's collection of charges based upon the "filed" documents because they did not comply with ICC regulations. The Supreme Court held:

> But the contention [non-compliance with tariff regulations] is without merit. The documents were received and placed on file by the Commission without any objection whatever as to their form and it is certain that, as a matter of fact, they were adequate to give notice.

*Id.*, 235 U.S. at 375.

Similarly, here mileage rates, published in a tariff referring to another tariff as a governing publication for calculation of mileages, were placed on file at the ICC without any objection being made for many years after filing. Certainly, as documents on file with the ICC they are adequate to give notice of the applicable mileages. Even if Security's reference to another tariff is void, at worst the term "miles" becomes ambiguous and the shipper would be entitled to any reasonable determination of mileage.

In Ex Parte No. MC-370, *Tariff Improvement*, 365 I.C.C. 43 (1981), the ICC published a rule (49 C.F.R. Section 1312.7(f)(1)) stating that whenever a carrier files a tariff increasing rates without symbolizing the increase as required by ICC regulations, the tariff is unlawful and, unenforceable. This rule was set aside by this Court in *Aberdeen and Rockfish R.R. Co. v. United States*, 682 F.2d 1092 (5th Cir. 1982), *cert. granted, judgment vacated and remanded for findings in light of Interstate Commerce Commission v. American Trucking Association, Inc.*, 467 U.S. 1237 (1984). Thus, the contention in this case that the carrier's distance rates cannot be used because the ICC tariff publication rules were not fully complied with is flatly refuted by this Court's decisions in *American, Rockfish, Berwind* and *Davis*.

## B. THE COURTS OF APPEALS ARE IRRECONCILABLY SPLIT ON WHAT CONSTITUTES AN EFFECTIVE TARIFF.

In *Atlantis Express Inc. v. Associated Wholesale Grocers*, 989 F.2d 281 (8th Cir. 1993) the Court of Appeals held that, although the carrier's tariff was on file with the Commission, it was ineffective due to violations of the Commission's tariff publishing rules.[2] When contrasted against the recent holdings of the District of Columbia Circuit in *Overland Express, supra*, and the Seventh Circuit in *Brizendine v. Cotter & Company*, ___ F.2d ___, 1993 W.L.

[2] The issues raised by this petition are also presented in *F.P. Corp. v. Twin Modal, Inc.*, 989 F.2d 285 (8th Cir. 1993), *petition for cert. docketed* June 24, 1993 (No. 92-2062). The Court in *F.P. Corp.* relied upon its decision in *Atlantis Express, supra*.



292, 348 (7th Cir. 1993), it is clear that the Courts of Appeals are irreconcilably split on the question of whether a filed tariff, not rejected at the outset, is a valid, i.e. effective, tariff.

In *Overland Express*, the District of Columbia Circuit Court of Appeals reviewed and set aside the ICC's decision in *Jasper Wyman, supra*, pursuant to the Hobbs Act. 28 U.S.C. secs. 2321 and 2342. In *Overland Express* the court found that the ICC's power to retroactively void an effective tariff under its discretionary powers did not permit it to void the carrier's tariff merely because the carrier failed to provide a power of attorney to the publisher of the distance guide, stating:

> We rather doubt that [49 U.S.C.] sec. 10762(a)(1)'s permissive authorization for the Commission to require carriers to include other unspecified information is the type of "specific statutory mandate" the court had in mind in *American Trucking*. And the Commission does not seem authorized to reject tariffs retroactively to satisfy a *regulatory* policy not driven by a specific statutory mandate.

In *Brizendine v. Cotter & Company*, ___ F.2d ___, 1993 W.L. 292, 348 (7th Cir. August 5, 1993), the Court found that the ICC lacks the authority under its discretionary powers to retroactively void a filed tariff where the tariff refers to a distance guide in which the carrier did not participate. In *Brizendine* the Court found support for its position in this Court's decision in *American Trucking, supra*, and *Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990):

> *American Trucking* makes clear that a carrier's submitted rate becomes the legal, governing rate when the ICC accepts it. [citation omitted] *Maislin* adds that the filed rate doctrine trumps any contrary regulation promulgated by the ICC. The fact that the ICC interprets 49 C.F.R. sec. 1312(d) as a regulation that helps to *define* whether a rate is filed does not allow the ICC to escape the strictures of *Maislin*.

In noting whether the ICC's retroactive voiding was closely tied to the mandate claimed by the Third Circuit in the opinion below, that is, promotion of non-discriminatory rates, the Court in *Brizendine* stated:

> It is difficult to understand, despite Cotter's claim, how the practice of failing to file a power of attorney would lead to price discrimination. Again, Brown's tariff rate was not secret. Anyone who consulted it could compute the price of shipping. The presence or absence of a separate power of attorney would change nothing. In fact, relieving shippers of the requirement that they must pay rates on file because a formality is missing would do far more to upset the uniformity of pricing than refusing to enforce their tariffs. Like the policy struck down in *Maislin*, the ICC's policy here would "sanction [ ] adherence to unfiled rates, [and thus] undermine [ ] the basic structure of the Act" *Maislin*, 497 U.S. at 132, 110 S.Ct. at 2769, see also *Overland*, slip op. at 10.

Thus the decision in *Overland Express*, which directly reviewed the ICC decision in *Jasper Wyman*, and the decision in *Brizendine* stand in stark contrast to the holdings in *Freightcor Services, Inc. v. Vitro Packaging*, 969 F.2d 1563 (5th Cir. 1992) and the court below wherein the courts



found 49 U.S.C. sec. 10762(a)(1) was a "specific statutory mandate" allowing the ICC to retroactively reject an effective tariff.

In *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 1750 (1983), the continued vitality of *Davis, supra*, and *Berwind, supra*, was acknowledged. In *Genstar*, a shipper argued that the collection of tariff rates should be precluded because of an alleged unlawfulness in the carrier's tariff which, although filed, did not comply with ICC regulations. *Id.*, at 1308. The shipper had asserted its right to the full refund of an illegal rate increase, "not from the establishment of unlawful rates but from the unlawful publication of tariffs." *Id.* The shipper further maintained that unlawfully published tariffs could not serve to increase the transportation rate. The shipper objected to the publication because the carrier's increase exceeded previously approved levels and the updated tariffs did not "plainly state the changes proposed to be made in the schedules then in force as required by 49 U.S.C. sec. 6(3) (now revised as 49 U.S.C. sec. 10762)." *Id.* at 1308. The shipper also objected to the tariffs because they failed to "contain the appropriate symbols (required by agency regulation) or in any other way indicate the nature of the rate change." *Id.* at 1308. After reviewing these claims of tariff non-compliance the Court of Appeals for the D.C. Circuit held:

> The Supreme Court long ago rejected the view that a tariff on file with the Commission and never rejected by it should be disregarded or treated as nonexistent merely because of some element of substantive unlawfulness in the rate.

> [citation to *Davis* omitted], or some irregularity in the tariff filing formalities [citation to *Berwind* omitted]. The principle in these cases is that where the shipper has been charged no more than the rate reflected in the tariff on file, the remedy for unlawfulness or irregularity is measured not by looking to some other tariff but by the harm, if any, caused by the unlawfulness of irregularity.

*Id.* at 1308.[3]

Five Circuit Courts of Appeals have addressed the issue raised by this petition[4]. Two Circuits, namely the District of Columbia Circuit and the Seventh Circuit, have held that the ICC may not declare a filed tariff void retroactively because that tariff refers to a distance guide tariff in which the carrier did not participate. Two Circuits, namely the Third Circuit and the Fifth Circuit, have held that such tariffs are effective because they are on file, but that the ICC can declare the tariffs retroactively void and allow negotiated, unfiled rates to control in

---

[3] Note that the remedy mandated by the ICC in *Jasper Wyman*, a voiding of the tariff, may require re-audit and application of a higher rated tariff, resulting in still higher charges to the shipper, contrary to the remedy indicated by the *Genstar* Court! This would occur, for example, where a distance commodity rate is void and a higher class would become applicable instead.

[4] This question is also pending in other circuits, *see, Growe v. Malden Mills Industries, Inc.*, No. 93-1556 (1st Cir.); *F.P. Corp. v. Golden West Foods, Inc.*, Nos. 92-2000, 92-2045 (4th Cir.); *Freightcor Services, Inc. v. Kuhlman Corp.*, No. 93-5227 (6th Cir.); *Security Services, Inc. v. Ed Sweirkos*, No. 93-3210 (6th Cir.); *Security Services, Inc. v. All Freight Services, Inc.*, No. 92-55785 (9th Cir.); *Pope v. Amoco Fabrics and Fibres Co.*, No. 92-681 (11th Cir.).



order to foster the non-discrimination provisions of the Interstate Commerce Act. Finally one Circuit, namely the Eighth Circuit, as well as the ICC, declare that such filed tariffs need not be declared retroactively void because they never became effective in the first place. This Court should grant certiorari to resolve this clear conflict among the Circuit Courts of Appeals.

## CONCLUSION

For the foregoing reasons, the Petition of Security Service should be granted and a Writ of Certiorari issued to the United States Court of Appeals for the Third Circuit.

Dated: August 20, 1993.

Respectfully submitted,

PAUL O. TAYLOR
HARRIS AND TAYLOR
Counsel of Record
2950 Metro Drive, Suite 301
Bloomington, MN 55425
(612) 854-3996

*Attorneys for Petitioner*

**APPENDIX A**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| SECURITY SERVICES, INC., f/k/a RISS INTERNATIONAL CORPORATION, | ) | Civil Action No. 91-6782 |
| Plaintiff, | ) | Philadelphia, PA |
| vs. | ) | September 9, 1992 |
| K MART CORPORATION, | ) | 1:30 p.m. |
| Defendant. | ) | |

TRANSCRIPT OF BENCH OPINION
BEFORE THE HONORABLE
DONALD W. VANARTSDALEN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

PAUL O. TAYLOR, ESQUIRE
HARRIS AND TAYLOR
2950 Metro Drive
Bloomington, MN 55425

HARVEY S. LUTERMAN, ESQUIRE
LAW OFFICES OF HARVEY LUTERMAN
30 South 15th Street, 12th Floor
Philadelphia, PA 19102

For the Defendant:

CHARLES L. HOWARD, ESQUIRE
HOYLE, MORRIS & KERR
1650 Market Street, Suite 4900
Philadelphia, PA 19103

WILLIAM AUGELLO, ESQUIRE
AUGELLO, PEZOLD & HIRSCHMANN
120 Main Street
Huntington, NY 11743

Audio Operator:

JAMES FINEGAN

Transcribed by:

DIANA DOMAN TRANSCRIBING
P. O. Box 67
Audubon, NJ 08106
(609) 547-2506
FAX: (609) 547-8973

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

[p. 2] (Call to Order of the Court)

THE COURT: Thank you very much gentlemen. The oral argument has been helpful. This is a motion for summary judgment. I could, of course, take it under advisement, which would mean it would probably be about three months or so and my law clerk would write for me a list of cases and probably make a very nice opinion out of it, but I don't think that this case really requires that. It seems to me that I can give you my decision at this time and give you my basic reasons for the decision that I reach. After all, there's a lot of case law on this – on this particular issue.

This is a motion for summary judgment. The standards for granting summary judgment or denying summary judgment are well-known and are frequently cited. I'm not going to bother to recite them at this time. The



issue in this case, as I see it, is whether a trustee in bankruptcy for a bankrupt interstate motor carrier may recover "undercharges" from a shipper where the carrier and the shipper had a long-term relationship, based on a contract or contracts for hauling various goods of the defendant shipper, K Mart Corporation.

Plaintiff's claim is based on the alleged tariffs which it had filed with the Interstate Commerce Commission, which I will probably refer to as the ICC. Defendant claims that it was a contract carrier, that the rates sought to be recovered are not reasonable, and that the filed – alleged [p. 3] filed tariff is void as to the claimed mileage guide, making determination of the tariff applicable incomplete and unable to – impossible to be calculated.

There is no question that under the controlling law, properly filed tariffs permit a trustee in bankruptcy for a bankrupt interstate motor common carrier to recover the full applicable tariffs, when the carrier billed for lesser amounts which were promptly paid by the shipper. The fairly recent case of *Maisland*, that's M-A-I-S-L-A-N-D, *Industries, U.S., Incorporated vs. Primary Steel, Incorporated*, 110 Supreme Court 2759, 1990, reiterated and reaffirmed this general principle, provided the rates are, in the wording of the act, "reasonable," and the carrier is a common carrier as opposed to a contract carrier.

Defendant asserts, among other defendants, that the rates are not reasonable within the meaning of 49 U.S.C. Section 10701A. Most Circuit Courts of Appeals that have ruled on this issue have held either directly or in dicta that a reasonable defense may be asserted to an undercharge claim. And I would refer to the case of *Atlantis*

*Express, Incorporated vs. Standard Transportation Services, Incorporated,* 955 F.2d, 529, 535, 536, Eighth Circuit, 1992, and also I refer to defendant's brief on the motion for summary judgment, pages 34 and 35.

The Fourth Circuit Court of Appeals, *In Re: Carolina* [p. 4] *Motor Express, Incorporated,* 949 F.2d 107, 1991, held that the shipper would first have to pay the tariff rate and seek reparations as the basis for – of an unreasonable tariff. The U. S. Supreme Court has granted certiorari and I understand that it's under the name, although I may be mistaken in this citation, of *Cooper vs. Delaware Valley Shippers,* where certiorari was granted on May 18th, 1992 as reported in 1992 West Law, 60686, 60 U.S. Law Week 3675, reported as case number 91-1496.

In any event, both parties to this litigation agree, as I understand it, that to the extent, if any, that a reasonable defense may be asserted, the ICC has primary jurisdiction and would in the first instance have to determine what is a reasonable rate. Consequently, I would not decide this issue, and at most could only refer the issue to the ICC for determination. This is a procedure that has been frequently utilized in similar cases.

Another defense that is raised is that the carrier in this case in its relationship to the shipper, K Mart, was a contract carrier and not a common carrier, and hence the filed tariff rates upon which the plaintiff relies are inapplicable. Again, the parties appear to agree that if the issue of contract carrier or – versus common carrier is critical to the decision, this is a matter in which the ICC has primary jurisdiction and determination would



require referral to the [p. 5] ICC. I refer to the plaintiff's brief page 20 and defendant's brief page 27 to 31.

However, a recent decision of Judge Waldman of this court, *Securities Services, Incorporated, f/k/a Riss International Corporation vs. John Mathey, M-A-T-H-E-Y, Incorporated,* No. 91-6699, Eastern District of Pennsylvania, July 15th, 1992, held that a District Court may properly decide the issue of contract carriage versus common carriage if there is no dispute of facts and it's solely one of law. And that case of Judge Waldman cited other cases in other jurisdictions that seemed to indicate that it is a matter that may be determined by a District Court.

Irrespective of the defenses of the filed tariffs being unreasonable and that the shipments involved were made by a contract carrier, and pursuant to a valid contract of carriage rather than a common carrier, defendant contends that it is entitled to summary judgment on two bases. One, collateral estoppel precludes plaintiff from pursuing this claim because in at least – and I believe it's five decided cases filed by the same plaintiff, in which the same issues were raised, the cases were decided against plaintiff. And I would cite the cases in plaintiff's – defendant's brief on page eight. The basis of these cases was that the tariffs upon which the plaintiff relied, and which are the same tariffs involved in this case, were void and unenforceable.

[p. 6] Plaintiff's response simply contends, and without any support so far as I can ascertain, that the cited cases do not decide the issue of whether the tariff could be invalidated retroactively. All of the cited cases, so far

as I can determine, were claims by the trustee for undercharges based on filed tariffs. The tariffs were held void and unenforceable. As I read the cases, it is clear to me that the issues were exactly the same as in the present case, whether they are denominated as issues of retroactivity expressly or not.

Plaintiff says that the *Cramer Products* case merely refers to the retroactive issue in footnote five. That case is *Security Services, Incorporated vs. Cramer,* that's C-R-A-M-E-R Products, Incorporated, No. 91-966, Western District of Missouri, July 14th, 1992. I do not agree with that statement of plaintiff in plaintiff's brief. Critical to the decision was the holding that the tariff when filed was "ineffective" and therefore action for an undercharge for shipment made after the date of the filing could not be recovered on the action. It is, as I see it, the exact same issue as the present case, it is the exact same issue as presented in the present case, whether or not it is categorized as being a retroactivity – or a retroactive issue.

The basic contention made in defense of all of the [p. 7] cited cases in which recovery was disallowed is the same as in the present case. That is, the filed tariffs of Security Services, Incorporated, which is also known as Riss International, referred to a mileage guide that was included in tariffs filed by the Household Carriers Goods Bureau. That mileage guide was essential to compute the "undercharges." Although a carrier such as Riss may incorporate the tariffs of another carrier or of a tariff bureau in its tariffs, it may only do so if it has filed a power of attorney or a concurrence in accordance with the ICC regulations. This is by expressed ICC regulatory mandate.



It is established by the affidavit of Ann M. Cleland attached to defendant's motion for summary judgment, that at the time Riss filed its tariffs on which it seeks recovery on the undercharges in this case, Riss International Corporation the carrier, was not a party to the mileage guide tariffs filed by the Household Goods Carriers Bureau, and that Riss' participation therein had been canceled sometime prior thereto, I believe on February 19th, 1985. It is – I believe that this fact was in no way disputed by – by the plaintiff in this case, and that the plaintiff agrees that at least as of the time – time periods involved in this litigation, that it was not a participant in the filed tariffs of the Household Goods Carriers Bureau's mileage guide.

*Freightcor,* that's F-R-E-I-G-H-T-C-O-R, *Services,* [p. 8] *Incorporated vs. Bitro Packaging, Incorporated,* reported in 1992 West Law 142807, No. 91-1507, Fifth Circuit, amended decision of August 14th, 1992, flatly disagrees with plaintiff's position, as I believe plaintiff concedes in its brief on page 10, and I believe plaintiff conceded here in oral argument.

As nearly as I can understand plaintiff's position, it is that whenever a tariff is filed with the ICC, it becomes the controlling tariff unless expressly rejected or suspended by the ICC in accordance with statutory and regulatory provisions. This is true under plaintiff's argument irrespective of the nature of any defect in the filing. Plaintiff asserts that any other holding would be in fact a contradiction to the *Interstate Commerce Commissions vs. American Trucking Association, Incorporated,* 467 U.S. 354, 1984, which precludes the ICC from nullifying retroactively effective tariffs. That case which the parties, and which I

will refer to as *ICC vs. ATA*, involved the validity of ICC inter – of an ICC interpretative ruling that – that where ICC determined there were substantial bureau agreement violations such as unauthorized collusion or illegal bureau pressure on independent carriers, upon a complaint by a shipper or other carriers or interested parties, after a hearing the ICC would "reject" the filed tariff retroactively.

The Supreme Court said the ICC could not ordinarily [p. 9] reject retroactively properly filed tariffs. But under the particular circumstances of that case, it could if there were – it was allowed to and the Supreme Court said retroactive rejection could be done if there were "substantial violation of the Rate Bureau agreements, and if the cases clearly and directly related to the ICC expressed statutory powers and is designed to achieve objectives not for the ICC – the objectives set for the ICC by Congress." That's at – in that case at pages 355, 356.

*ICC vs. ATA* did not involve any issue as to whether the tariffs when originally filed were valid, lawful or effective. It was assumed that they were. The Supreme Court was merely concerned with whether the ICC could, as a remedial measure, retroactiv[illegible]y reject a filed tariff. Although the Supreme Court did say at page 364 that "We conclude that Section 10762E does not bestow on the Commission a general authority to reject effective tariffs," the Supreme Court did not purport to define what constitutes an effective tariff, beyond noting the statutory and regulatory procedures for initially rejecting proffered tariffs, and noting that because of the lack of ICC personnel to carefully review all tariffs, tariffs may frequently be



filed and become effective that should have been initially rejected.

The ICC in a recent holding directly on point as to the issues in this case held that under 49 CFR Section [p. 10] 1312.4D, it could declare as void tariffs that had been filed in violation of statutory and regulatory requirements. And that case, of course, is *Jasper Wyman*, W-Y-M-A-N, *and Sons, petitioner for declaratory order*, 8 ICC 2.d 246, 1992. *Jasper Wyman* in substance, as I read it, held that where the plaintiff – where the filed tariffs do not comply with expressed regulatory mandate, the tariff never becomes "effective." *Jasper-Wyman* is on appeal to the – to the District of Columbia Circuit as No. 92-1037 under the name I believe of *Overland Express, Incorporated vs. ICC*, 1992.

I believe that there are valid grounds to grant summary judgment for defendant and against plaintiff on the basis of collateral estoppel. The same issue has been repeatedly litigated by plaintiff and decided against plaintiff. See cases cited in defendant's brief. And I think that the plaintiff conceded in oral argument that there are no litigated cases of which he is aware in which his client was successful in recovering an overcharge.

However, rather than grant summary judgment because of collateral estoppel, I've considered the motion for summary judgment on the merits. Essentially for the reasons set forth in *Securities Services, Incorporated f/k/a Riss International Corporation vs. Cramer Products, Incorporated* and *Atlantis Express, Incorporated vs. Associated Wholesale Grocers, Incorporated*, District of Minnesota, Civil Action [p. 11] 4-90-254, decided March 6, 1992, as

well as and I would say primarily upon *Jasper-Wyman*, I conclude that defendant is entitled to summary judgment.

Attached to defendant's brief, there are additional cases and ICC rulings for failure to participate in the HG – the mileage tariff, and they're cited – I believe they are all contained in Exhibit 1 to plaintiff's – to defendant's rebuttal brief. So I won't recite them at this time.

Let me add that if plaintiff's arguments were accepted, it would seem logically to follow that no matter how defective a tariff filing might be, if it was not immediately rejected or suspended in accordance with the statute and regulations, it will become the effective tariff. Thereafter, even if the parties, both the carrier and the shipper, recognize that the attempted filed tariffs were defective and assessed charges on the basis of some previously filed valid tariff, the carrier could later recover undercharges based on the defective tariff.

The so-called Filed Tariff Doctrine was to permit carriers and shippers from entering into private or secret agreements whereby there could be shown favoritism to certain shippers through lower charges, rebates and other advantages against – as against other shippers. The Filed Tariff Doctrine was never intended to allow tariffs that are filed in violation of clear statutory and/or regulatory mandates to [p. 12] become fully effective, simply because as a procedural matter the ICC cannot scrutinize and reject in advance all improper tariff filings.

I am aware of plaintiff's contentions that even if the tariff was defective in the sense of being initially subject to rejection or suspension because the plaintiff carrier



had neither exec – had neither executed a power of attorney, or if he had, that that had been terminated and had not been included in the filing – in the tariffs filed by the – by the Household Goods Carriers Mileage Bureau filing, and that there had been no concurrence to the mileage guide. The defect, if any, was purely a minor technical violation and that mileage is an issue or a matter that can be fairly and accurately determined as a factual matter. And also that the plaintiff did incorporate the mileage guide by reference. In other words, plaintiff claims a substantial compliance with the ICC regulations to the extent that those regulations would be otherwise valid.

49 CFR. Section 1312.4D expressly provides, "A carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law. Should a challenge to a tariff be made on this basis, carriers will be required to submit the necessary proof." The [p. 13] regulation was undoubtedly made because the ICC lacks sufficient personnel to determine if all referred to tariffs of others was based on a filed power of attorney or concurrence. It put the burden on the carrier to comply with the law.

Plaintiff has submitted no proof that there was a valid power of attorney in effect at the time of the filed – of the filed tariff or the alleged filed tariff. And I believe that the plaintiff concedes that it was not at the time the tariffs were filed a participant in the mileage guide that had been filed by the Household Goods Carriers Bureau.

Although plaintiff argues that the Riss tariff substantially complied with ICC tariff requirements and therefore are fully enforceable, and I refer to plaintiff's brief page 14, this argument it seems to me is akin to an equitable argument that is clearly inapplicable in ICC tariff litigation, except on the possible question of whether a rate is reasonable.

If the ruling announced in this case appears to be harsh and hyper or super technical to plaintiff, it should be borne in mind that the so-called Filed Tariff Doctrine is itself a rigid doctrine, as stated in *Maisland Industries* at page 2766. And in the words of the Supreme Court in *Maisland Industries* at 2767, in which the Supreme Court said that, "Despite the harsh effects of the Filed Rate Doctrine, we have [p. 14] consistently adhered to it." So it is clear that the Filed Rate Doctrine itself is a harsh doctrine and is a rigid doctrine, and therefore technicalities, it seemed to me, are not inappropriate to be utilized, especially in a case such as this where the ship – the carrier had full knowledge and notice and was well aware of the regulations of the ICC, and has offered no reasonable explanation whatsoever as to why it had not filed – or that there was not a proper participation in the filed tariff of – of the Household Goods Carriers Bureau filing as to the mileage guide.

In essence, in this case there was no filed tariff for the ICC upon which a computation of the undercharge could be made. To compute a charge requires an amount per mile and then mileage. Although plaintiff's filed tariffs referred to the mileage guide of the Household Goods Carriers Bureau filing, they did not and could not under the law become a participant of the plaintiff's filed tariffs



because apparently they had not paid the charges and the Bureau had not included them in the list of participants to that particular guide. ICC regulations expressly make such a filing, as done by the carrier in this case, void. The reference without participation in the mileage guide is ineffective, and therefore there was no effective filed tariff as to the mileage charges.

I would say also as an aside, plaintiff has [p. 15] challenged on several grounds the affidavit of Michael Bange, or B-A-N-G-E, a reputed expert witness for defendant. Being – plaintiff being unable to establish by any admissible evidence that it has properly participated in the Household Good Carriers tariffs mileage guide, although it contends that it had executed a power of attorney which had been canceled, and it being apparent and I think conceded by plaintiff that the mileage guide or some factually determinable substitute for it is necessary to compute any undercharges, the use of the Michael Bange affidavit, it seems to me, is wholly unnecessary and at least I have not relied upon it in reaching this decision.

I do not agree with plaintiff's position that *ICC vs. ATA* flatly refutes, as plaintiff says in his brief at page 17, the contentions of the defendants and the holding of *Jasper-Wyman*. Specifically, *ICC vs. ATA* held that under certain carefully circumscribed situations, a tariff could be rejected by the ICC after it was filed. Likewise, I did not agree that the Supreme Court's vacating of *Aberdeen and Rockfish Railroad Company vs. U.S.*, 682 F.2d 1092, Fifth Circuit 1982, suggests that improperly field tariffs can never be ruled to be ineffective. *Rockfish* was vacated and

remanded for reconsideration under the standard set forth in *ICC vs. ATA*. It was not reversed.

*Davis vs. Portland Seed Company*, 264 U.S. 403, 1924, [p. 16] is of little use because it involved an attempt by a shipper to obtain reparations for an alleged overcharge. That's somewhat the converse of the present case. The court denied recovery absent proof of actual damages. There the shipper was seeking to recover on the basis of an unauthorized publication of a lower long haul rate, unauthorized because not approved by the ICC. The shipper was charged the published short haul rate. The shipper was not allowed recovery.

The court did state that the statute requires rigid observance of its provisions, at page 425, and required adherence to the published rate. The court also opined on page 425, "Observance of the lower rate from Pacos (phonetic) put in without authorization might have been forbidden as pointed out in *U.S. vs. Louisville and Nashville Railroad Company*. This suggests to me at least that although published, a tariff violative of the law may be unenforceable.

*Berwin White Company vs. Chicago and Erie Railroad*, 235 U.S. 371, decided back in 1914, as I read it, simply held that the contentions that the demurrage traffics were not properly filed "is without merit," page 375. The court also said, "The fact is that the railroad had complied with the law as to filing tariff sheets." There is no suggestion that the court determined that there was any unlawfulness, lack of formality, or illegality in the filing, and therefore the [p. 17] demurrage charges were upheld. This has nothing to do, as I see it, with the question of



whether there was any type of rejection or that there was some improper filing that was somehow otherwise overlooked.

I agree in substance with the ruling of – of the Interstate Commerce Commission in *Jasper-Wyman*. Even if I had some doubts about that ruling, it seems to me that the ICC's interpretation of its own regulations and their applicability, particularly 49 CFR, Section 1312.4D, and whether a mileage guide is a tariff required to be filed, should be given deference by the courts, if the interpretation is a reasonable one. I think that the ICC interpretation and ruling, which the ICC acknowledged was of major importance to carriers and shippers throughout the motor transport industry, should be accepted.

Consequently, I conclude that defendant is entitled to summary judgment under the – on the undercharges – under the undercharge claims of defendant in this action, and I will enter summary judgment. And I'll just read that order. That upon consideration of defendant's motion for summary judgment and plaintiff's answers thereto, together with accompanying briefs, and after a hearing in open court on the motion, for the reasons stated in open court at the conclusion of the hearing, it is ordered that judgment is entered in favor of the defendant, K Mart, and against the plaintiff, Security [p. 18] Services, Incorporated, f/k/a Riss International Corporation, on all of plaintiff's claims being for tariff undercharges set forth in the complaint. I'll sign that order.

All right. Thank you very much, gentlemen.

COUNSEL: Thank you, Your Honor.

(Proceedings concluded)

* * *

CERTIFICATION

I, Roxanne Galanti, certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ Roxanne Galanti — Oct. 20, 1992
ROXANNE GALANTI — DATE



**APPENDIX B**

Filed June 18, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1833

SECURITY SERVICES, INC.
f/k/a RISS INTERNATIONAL CORPORATION,
Appellant

v.

K MART CORPORATION,
Appellee

Appeal from the United States District Court
for the Eastern District of Pennsylvania

D.C. No. 0313-2 : 91-06782

Submitted Under Third Circuit Rule
12(6) May 4, 1993
Before: COWEN, ROTH and ROSENN,
*Circuit Judges*

Opinion Field June 18, 1993

PAUL O. TAYLOR, ESQUIRE
Harris & Taylor
2950 Metro Drive
Suite 301
Bloomington, MN 55425
Attorneys for Appellant

WILLIAM J. AUGELLO, ESQUIRE
GEORGE CARL PEZOLD, ESQUIRE
RAYMOND A. SELVAGGIO, ESQUIRE
Augello, Pezold & Hirschmann
120 Main Street
Huntington, NY 11743

CHARLES HOWARD, ESQUIRE
Hoyle, Morris & Kerr
One Liberty Place
Suite 4900
1650 Market Street
Philadelphia, PA 19103-7397
Attorneys for Appellee

## OPINION OF THE COURT

ROSENN. *Circuit Judge.*

This case presents a recurring question of late whether a carrier in bankruptcy can recover undercharges under tariff rates filed for interstate commerce transportation notwithstanding the lower rates actually negotiated and collected prior to its bankruptcy. Plaintiff-Appellant Security Services, Inc., f/k/a Riss International Corporation (Riss), filed suit in the United States District Court for the Eastern District of Pennsylvania to recover undercharges from the Defendant-Appellee K Mart Corporation for interstate transportation services performed



by Riss on behalf of K Mart. K Mart defended this action by asserting a number of defenses, only one of which is pertinent here: that the tariff relied upon by Riss to calculate the undercharges was void as a matter of law at the time the services in question were performed.[1] If this defense is valid, the tariff cannot serve as a basis from which to calculate such undercharges.

The district court granted K Mart's motion for summary judgment, and Riss appeals. We affirm.

I.

On April 17, 1986, Riss and K Mart entered into a contract under which Riss agreed to transport goods on behalf of K Mart and K Mart agreed to pay for Riss's services at the rates specified in the contract. Between November 3, 1986, and December 29, 1989, Riss performed services for K Mart under the contract and submitted invoices for those services to K Mart in accordance

---

[1] Before the district court, K Mart also asserted the following defenses: 1) that in its relationship with K Mart, Riss was a contact carrier; 2) that the charges Riss sought to recover were based on unreasonable rates; and 3) that Riss was collaterally estopped from pursuing its claim because five cases involving the same issues had already been decided against Riss. The district court determined that the ICC had primary jurisdiction over the first two issues and therefore did not decide them. Although it found that collateral estoppel would apply, it declined to rule on that basis, preferring instead to proceed to the merits of the defense now at issue on appeal.

with the terms of the contract.[2] K Mart paid these invoices.

In November 1989, Riss filed a chapter 11 bankruptcy petition. At this point, Riss underwent a corporate reorganization and became known as Security Services, Inc. As debtor-in-possession, it conducted a post-petition audit which seemingly revealed that under the filed rate doctrine, it had undercharged K Mart by a significant amount for the services in question.[3] Riss calculated the amount of the undercharges by comparing the amounts it

---

[2] Title 49 U.S.C.A. section 11706(a) (West 1993) provides in pertinent part:

> A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . must begin a civil action to recover charges for transportation or service provided by the carrier . . . within 3 years after the claim accrues.

*See Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 123 & n.5 (1990) (applying three year limitations period to debtor carrier's post-petition claim for undercharges after originally billing at lower negotiated rate). Riss filed its complaint in the district court on October 30, 1991. We note that Riss's claim for undercharges on shipments made between November 3, 1986, and October 29, 1988, would appear to be barred by section 11706(a). K Mart, however, failed to assert this affirmative defense and therefore has waived it. Fed. R. Civ. P. 8(c); *Van Sant v. American Express, Inc.*, 169 F.2d 355, 372 & nn. 9, 10 (3d Cir. 1948). 5A Charles A. Wright & Arthur R. Miller. *Federal Practice and Procedure* § 1394 (2d ed. 1990).

[3] The filed rate doctrine, contained in the Interstate Commerce Act, 49 U.S.C.A. § 10101 *et seq.* (West 1993), mandates that common carriers file tariffs from which shippers can calculate their rates and limit those rates be charged by the carrier and paid by the shipper without exception, 49 U.S.C.A. § 10761-62.



had originally invoiced for these services under the contract with amounts that would have been invoiced according to the tariff Riss had on file with the Interstate Commerce Commission (ICC or Commission) at the time the services were performed. Riss thereupon invoiced K Mart for those undercharges plus interest; K Mart, however, refused to pay.

It is undisputed that on August 20, 1984, Riss issued distance rate tariff ICC RISS 501-B with the customary effective date 30 days later. This tariff remained on file with the ICC during the approximately four year period Riss performed the services in question for K Mart under the contract. The tariff in turn referred to and depended upon the Household Goods Carriers' Bureau (HGB) distance guide ICC HGB 100-A, its supplements, and subsequent issues, which specified (1) the distance in miles between various points of origin and destination, and (2) the carriers who were participants in the HGB distance guide.

Riss has produced no direct evidence showing it ever executed a power of attorney or concurrence permitting it to participate in HGB's distance guide. K Mart submitted evidence that HGB cancelled Riss's participation in the HGB distance guide on February 19, 1985, by Supplement 17 to the guide, for Riss's nonpayment of participation fees to HGB. K Mart also submitted evidence that HGB considers a power of attorney "dead" if a carrier fails to renew it (by submitting the participation fees) within a reasonable time after cancellation. There is no evidence, apart from HGB's cancellation of Riss's participation, that Riss, as principal, ever revoked any power of attorney

that may once have existed, or that HGB, as agent, ever renounced any such power of attorney.

II.

A. APPLICABLE LAW

Our review of a district court's grant of summary judgment is plenary. *Carlson v. Arnot-Ogden Memorial Hosp.*, 918 F.2d 411, 413 (3d Cir. 1990). We affirm only if there are no genuine issues of material fact and the relevant law entitles the moving party to judgment. *Carter v. Rafferty*, 826 F.2d 1299, 1304 (3d Cir. 1987); Fed. R. Civ. P. 56(c).

The Supreme Court provided the classic formulation of the Act's filed rate doctrine when it stated in pertinent part:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers . . . are charged with notice of it, and they as well as the carrier must abide by it. . . . Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed.

*Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915). No contract between a carrier and shipper can reduce the amount payable under filed and published tariffs specifying the rates adopted by the carrier. *Louisville & Nashville R. Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924); *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922). "The duty to file rates with the Commission, see [49 U.S.C.] § 10762, and the obligation to



charge only those rates, see [*id.*at] § 10761, have always been considered essential to preventing price discrimination and stabilizing rates." *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990). The Court has acknowledged that the rule is strict and may at times work a hardship, but this rigid approach has been deemed necessary to promote the congressional policy of preventing unjust discrimination in interstate commerce. *Id.* at 127-28.

Under ICC regulation, a distance rate tariff consists of two parts: (1) the dollar rate that a carrier charges per mile, and (2) the distance in miles between various points of origin and destination, 49 C.F.R. § 1312.30 (1992); *Jasper Wyman & Son*, 8 I.C.C. 2d 246 (1992). No. 40510, 1992 WL 17399, at *1 (I.C.C. Jan. 29, 1992), *petition for review docketed sub nom, Overland Express, Inc. v. I.C.C.*, No. 92-1037 (D.C. Cir. Feb. 13, 1992). Because the number of miles between two points will vary depending on the route chosen, specification of that number precludes a carrier from favoring one shipper over another by calculating a lower charge for the favored shipper based on a shorter route. This promotes Congress's policy of preventing price discrimination. When a common carrier elects to file a distance rate tariff, as did Riss, it must provide both components to allow a shipper to calculate transportation costs for a given shipment. If a tariff is incomplete because one or the other of these components is missing, the shipper cannot put the tariff to its intended use.

Tariff ICC RISS 501-B specified only the first required component, i.e., the dollar rate Riss would charge per mile. As permitted by ICC regulation, however, Riss's

tariff referred to the HGB distance guide (and its supplements and subsequent issues) to provide the second component. 49 C.F.R. § 1312.30(c)(1)(iii), (c)(4). HGB's distance guide, officially on file with the ICC according to the mandate in 49 C.F.R. section 1312.30(c)(4), is deemed a tariff in its own right. *Jasper Wyman*, 1992 WL 17399, at *3; *Freightcor Servs., Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563, 1566 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (1993). "Carriers participating in tariffs which refer to, and are governed by separate tariffs. . . . shall also participate in those governing separate tariffs." 49 C.F.R. § 1312.27(e).

To participate as required in a governing separate tariff issued in the name of an agent, as Riss purports to have done in HGB's distance tariff, a carrier must execute a concurrence or power of attorney; *Id.* at § 1312.4(d). Once properly executed, this concurrence or power of attorney must remain effective, because absent an effective concurrence or power of attorney, "tariffs are void as a matter of law." *Id.* Further, if a tariff is challenged on the basis of an allegedly ineffective concurrence or power of attorney, the carrier is responsible for submitting the necessary proof to the contrary. *Id.; cf. id.* at § 1312.10(a). "Revocation . . . of the power of attorney [or] . . . concurrence should be reflected through lawfully published tariff revisions. . . . " *Id.* at § 1312.10(a), (b)(2).

Agents filing governing separate tariffs, such as HGB, are required to provide a list of participating carriers, either within the tariff itself or in a separate participating carriers tariff. *Id.* at §§ 1312.13(c)(1), 1312.25(a). When it is necessary to amend this list due to e.g., the cancellation of a carrier's participation, such amendment



is accomplished by issuing a supplement to the tariff in which the list appears, as HGB did in this case. *Id.* at §§ 1312.17(a-b), 1312.18, 1312.25(d); *see also id.* at § 1312.10(a), (b)(2).

## B. THE DISTRICT COURT'S DISPOSITION OF THE CASE

The district court based its grant of summary judgment on the ICC's ruling in *Jasper Wyman*, which is directly on point. In *Jasper Wyman*, as in the present case, the carrier sued the shipper for undercharges based on its distance rate tariff on file with the ICC, which referred to an HGB distance guide as a governing separate tariff.

As in the instant case, the carrier in *Jasper Wyman* contended, without producing any evidence, that at some point it had executed a power of attorney which remained effective to permit participation in the HGB's governing separate tariff at all times pertinent to the claim for undercharges. The shipper, however, presented evidence 1) that the carrier participated in HGB's governing separate tariff from 1970 to May 22, 1983, only, on which date HGB cancelled the carrier's participation for nonpayment of fees in a supplement to its tariff; and 2) that HGB considers a carrier's power of attorney "dead" if the carrier fails to renew it by submitting participation fees within a reasonable time after cancellation. The undercharges sought by the carrier related to transportation services performed after the cancellation date of May 22, 1983.

In *Jasper Wyman*, the ICC first determined that at the time in question there was no effective power of attorney

to permit the carrier's participation in HGB's tariff. Further, the ICC found that, even if an effective power of attorney existed, the carrier was not a participant in HGB's tariff at the time in question because the carrier was not listed by HGB as a participant in the tariff at that time. The ICC finally concluded that either of these determinations of nonparticipation sufficiently precluded the carrier from relying on HGB's tariff for the computation of its freight charges. It therefore held that the carrier's incomplete and ineffective tariff could not lawfully support the claim for undercharges.

In the present case, the district court, on facts identical in all essential respects to those of *Jasper Wyman*, found that Riss had submitted no proof of the existence of an effective concurrence or power of attorney for the period in question. Further, the court found that HGB did not list Riss as a participant in its distance tariff for this period. Because Riss failed both tests under *Jasper Wyman* for an effective participation in HGB's governing separate tariff, the court concluded Riss could not tie into the HGB tariff to complete its own tariff. Consequently, it held that shippers could not compute Riss's charges under the incomplete and therefore ineffective tariff. Thus, Riss had no valid tariff to serve as a basis for calculating undercharges on its shipments for K Mart.

III.

Riss first contends that the district court erred because its tariff complied with ICC regulations in that Riss never revoked its power of attorney originally issued to HGB. Riss further contends that even if its tariff did



not comply with ICC regulations, applicable Supreme Court precedent prohibits the ICC from retroactively rejecting an effective tariff. Riss also asserts that the Riss tariff was in substantial compliance with governing ICC regulations. Finally, if the tariff is deemed void, Riss argues it is nonetheless entitled to receive reasonable compensation for its services, which may be more than the contract rate.

A. COMPLIANCE WITH THE REQUIREMENT OF AN EFFECTIVE POWER OF ATTORNEY

Riss submitted no evidence of the existence of a power of attorney effective during the time pertinent to this litigation. Nevertheless, Riss artfully contends that K Mart's evidence of HGB's 1985 cancellation of its participation in the HGB distance guide raises inferences (1) that it had been a participant in HGB's governing separate tariff prior to the cancellation date; (2) that at one time it had executed a power of attorney to HGB to support its participation; and (3) that such power remained effective at all times pertinent to this litigation. Thus, it argues that its tariff cannot be declared void pursuant to section 1312.4(d).

Section 1312.4(d) provides in pertinent part:

> [A] carrier may not participate in a tariff in the name of . . . an agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law. Should a challenge to a tariff be made on this basis, carriers will be required to submit the necessary proof.

49 C.F.R. § 1312.4(d). The regulation is precise and specific: It plainly mandates that, upon challenge, the *carrier* submit the proof necessary to establish the existence of an effective power of attorney. The carrier proof provision plausibly places the burden of production upon the carrier, as the party most likely to control relevant evidence, to produce that evidence or suffer the consequences. Here, however, the record does not show that Riss has made any effort to carry its burden. Under such circumstances, a further inquiry into whether an effective power of attorney existed during the relevant period of time is unnecessary.

Further, even if this court should proceed to the merits, the evidence of record does not create a genuine issue of material fact precluding summary judgment for K Mart. An examination of the inferences Riss relies upon shows that the inference critical to Riss's assertion of compliance with section 1312.4(d) is *not* properly raised from the evidence. K Mart's evidence that HGB canceled Riss's participation on February 19, 1985, may raise an inference that at some time prior to that date Riss executed a power of attorney allowing it to participate in HGB's tariff; additionally, it may raise an inference that such a power of attorney remained effective until the cancellation date. Based on general principles of agency law, however, it does not raise an inference that there was an effective power of attorney in existence after HGB canceled Riss's participation. In fact, any inference to be drawn is to the contrary and therefore fatal to Riss's position.

General agency law holds that "[a]uthority created in any manner terminates when either party in any manner



manifests to the other dissent to its continuance, or unless otherwise agreed, when the other has notice of dissent." Restatement (Second) of Agency § 119 (1958). "Such termination by act of the principal is revocation; by act of the agent. It is renunciation." *Id.* at § 118 Cmt. a. A principal, such as Riss, "may manifest [a] termination of consent by conduct which is inconsistent with its continuance: an agent such as HGB, "may manifest renunciation by conduct inconsistent with the continued performance of [its] duties to the principal." *Id.* at § 119 cmt b.

In the present case, HGB's duties to Riss, under any power of attorney that may have once existed were to publish and file a distance tariff on Riss's behalf. *See* 49 C.F.R. § 1312.10(a). To obtain these services. Riss presumably agreed to pay HGB the required participation fees. Accepting as true the inference that Riss had issued a power of attorney, as we must on summary judgment. Riss nonetheless manifested a revocation of that power of attorney when it failed to make the required payment of participation fees because its failure to pay constituted conduct inconsistent with the continuance of its consent. We conclude that this manifestation of revocation rendered ineffective any power of attorney Riss may have issued.

Further, HGB had the power to renounce the authority vested in it by any power of attorney Riss may have issued. It could manifest such a renunciation by conduct inconsistent with the continued performance of the duties it owed Riss. Such a renunciation would render the power of attorney ineffective. HGB's cancellation of Riss's participation in its tariff unquestionably is conduct inconsistent with the continued performance of HGB's

duties to Riss. Thus, we also conclude that, even absent a revocation by Riss. HGB's cancellation operated as a renunciation of authority rendering ineffective any power of attorney Riss may have once executed.

The conclusion that any power of attorney Riss may have issued did not survive its failure to pay or HGB's cancellation of its participation is further supported by evidence that HGB generally considers a power of attorney "dead" at the time of cancellation for nonpayment of fees if the carrier does not renew the power of attorney by submitting the necessary fees within a reasonable time after cancellation. There is no evidence that Riss ever submitted fees to HGB at any time after cancellation, much less within a reasonable time, to "renew" its pre-cancellation power of attorney. Additionally, there is no evidence that Riss issued a new power of attorney to HGB after the cancellation.

Riss also contends that its power of attorney should not be deemed ineffective because HGB did not give it advance actual notice of cancellation. Riss relies on a 1939 ICC notice discussing cancellation of participation for this advance notice requirement. The filed rate doctrine however, charges carriers and shippers alike with constructive knowledge of filed tariffs. HGB's cancellation, filed in a supplement to its tariff, afforded Riss sufficient notice of both the cancellation and HGB's renunciation of any power of attorney that may once have existed. *See Jasper Wyman & Son*, 8 I.C.C. 2d 246 (1992). No. 40510, 1992 WL17399, at *5 (I.C.C. Jan 29, 1992), *petition for review docketed sub nom. Overland Express, Inc. v. I.C.C.*, No. 92-1037 (D.C. Cir. Feb. 13, 1992). A holding to the contrary would vitiate the filed rate doctrine.



Thus, even if this matter is considered on the merits based on the record before this court, the undisputed facts establish that any power of attorney that may have existed became ineffective either when Riss failed to submit its participation fees or, at the latest, once HGB canceled Riss's participation in its distance tariff. Therefore, whether this court applies the carrier proof provision of section 1312.4(d) or decides on the merits under that same section, Riss has failed to "designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Under the relevant law, Riss's tariff was void when K Mart made its shipments in 1986 through 1989 because any power of attorney it previously may have issued became ineffective in 1985, 49 C.F.R. § 1312.4(d), and a void tariff cannot support the undercharges Riss seeks. *Jasper Wyman*, 1992 WL 17399, at *1; *Freightcor Servs., Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563, 1572 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (1993). Therefore absent a reason for not applying section 1312.4(d) as written, K Mart is entitled to judgment as a matter of law.

## B. RETROACTIVE VOIDING OF AN EFFECTIVE TARIFF

### 1. The Validity of the Voiding Provision in Section 1312.4(d)

Riss, however, challenges the authority of the ICC to promulgate and apply the remedial voiding provision of section 1312.4(d) without specific statutory authority. The parties do not dispute that there is no express statutory

authority for section 1312.4(d). Riss argues that this voiding provision must be subjected to the test governing the ICC's discretionary authority to reject retroactively effective tariffs as set forth by the Supreme Court in *ICC v. American Trucking Association, Inc.*, 467 U.S. 354 (1984). In *American Trucking*, the Court determined that, in the absence of specific statutory authority, the remedy of retroactive rejection had to satisfy two criteria to lie within the ICC's discretionary power: "[F]irst, the power must further a specific statutory purpose, and second the exercise of power must be directly and closely tied to that mandate." *Id.* at 367. Riss contends that the voiding provision does not satisfy these criteria.

K Mart urges that a voiding of Riss's tariff under section 1312.4(d) is not a discretionary retroactive rejection of an *effective* tariff that must satisfy standards set forth in *American Trucking* because Riss's tariff was *ineffective ab initio*; alternatively, K Mart argues that if the voiding provision must satisfy the *American Trucking* test. It passes that test and can be applied to void Riss's tariff. For purposes of this discussion and following settled summary judgment law, we take as true the inferences that an effective power of attorney existed from the time Riss issued ICC RISS 501-B in 1984 through HGB's cancellation of its participation in 1985. Consequently, we accept, contrary to the distinction K Mart attempts to demonstrate between this case and *American Trucking*, that Riss's tariff was effective when filed.[4]

---

[4] K Mart interprets *American Trucking* to apply only to effective tariffs, meaning tariffs in compliance with the ICC's tariff regulations. We note without deciding, however (as did the district court, Bench Op. Tr. at 9), that the Court in *American Trucking* arguably used the term "effective" to refer to nothing more than a tariff – whether defective or not – that had passed its effective date without suffering a statutorily permissible pre effective date rejection by the ICC. *See, e.g., American Trucking*, 467 U.S. at 360 n. 4 ("tariffs with obvious defects inevitably are permitted to go into effect"). If this is the case, then the *American Trucking* test would also apply to determine the validity of the voiding provision of section 1312.4(d) even when, unlike the present case, there was no effective concurrence or power or attorney in existence at the time a tariff referring to a governing separate tariff was initially filed.



This alone does not determine the applicability of the *American Trucking* test. *American Trucking* decided whether the ICC had discretionary remedial enforcement authority to retroactively reject an effective tariff, rendering it void *ab initio*. *Id.* at 358, 368 & n.9, 370. Here, the remedy the ICC adopted under section 1312.4(d) is not the exercise of the power of rejection; rather, it is a remedial power to declare a tariff void from the moment a carrier does not effectively concur or maintain a power of attorney to support its participation in a governing separate tariff. The remedial power in this case is in some respects broader than the remedy examined in *American Trucking*. It not only would apply to void a tariff *ab initio* because an effective concurrence or power of attorney did not exist when the tariff was filed; it also allows the voiding of a tariff that was originally accompanied by the required concurrence or power of attorney at some later date if the concurrence or power of attorney becomes ineffective.

Under either scenario, section 1312.4(d) would operate as did the remedy examined in *American Trucking*, to

declare a tariff retroactively void. This voiding power, like the remedy in *American Trucking*, could leave a carrier exposed to overcharges, regarding which the Court stated, "[T]he very potency of overcharge is what makes the nullification of motor-carrier tariff's a troubling exercise of Commission authority. For a motor carrier, overcharge liability may be ruinous." *Id.* at 369-70. Because *American Trucking's* retroactive rejection and the present case's retroactive voiding both raise the same basic concerns regarding overcharge liability. We agree with Riss that the validity of the voiding provision is governed by the test provided in *American Trucking*. *Accord Freightcor*, 969 F.2d 1563 (subjecting section 1312.4(d) to the *American Trucking* test). *But see Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.*, No. 92-1771, 1993 WL. 83831 (8th Cir. Mar. 26, 1993) (concluding scrutiny of section 1312.4(d) under *American Trucking* test unnecessary); *Jasper Wyman*, 1992 WL. 17399, at *7. We also agree, however, with K Mart's alternative argument that the voiding provision complies with the test set forth in that case.

The Court of Appeals for the Fifth Circuit has addressed this same issue and has determined that the ICC's discretionary power under section 1312.4(d) satisfies *American Trucking's* two-part test. *Freightcor*, 969 F.2d at 1568-72. We agree with the *Freightcor* analysis. As to the first criterion that the power must further a specific statutory mandate of the Commission, the court stated:

> [T]he congressional mandate to the ICC is that the Commission must maintain a fair and efficient transportation market, which, at the very least, does not permit secret negotiations and arrangements between carriers and shippers.



> [*See Maislin*, 497 U.S. at 130-31.] Mindful of this policy, the Commission is specifically under a statutory mandate to determine what information must be provided in every joint tariff and [to] provide mechanisms to ensure that this information is provided and is accurate. [49 U.S.C. § 10762(a)(i).] Pursuant to this obligation, we believe that there is a strong presumption that the Commission must require the disclosure of the identity of the carriers participating in every tariff.

*Freightcor*, 969 F.2d at 1571. The court determined that the power to void a tariff that refers to another tariff governing its terms, when the mandated participation in that governing separate tariff is unsupported by the required effective concurrence or power of attorney, furthers a specific statutory mandate by furthering the disclosure of the identity of carriers participating in governing separate tariffs. We agree that the first criterion of the *American Trucking* test is thus met in this case.

As to the second criterion that the ICC's exercise of power must be directly and closely tied to such a specific statutory mandate, the court stated:

> In fulfilling the statutory mandate, the Commission designated participation *via* concurrence or power of attorney. The ICC regulations prescribe a simple method for compliance with the statute and declare that tariff's that do not comply with important statutory mandates are void. Stated another way, the regulation defines the essential elements of an effective tariff that refers to other tariffs that govern its terms.

> Although the use of voiding as a method of [securing] compliance is potentially a harsh measure, we are satisfied that the Commission has not exceeded its discretion by determining that tariff's are void if they fail to comply with [regulatory provisions] that serve important statutory purposes.

*Id.* Thus, the court determined that the exercise of power is directly and closely tied to the statutory mandate. We agree that the second criterion of the *American Trucking* test is also met here. We therefore hold that under the *American Trucking* test the ICC has the discretionary power to void effective tariffs under section 1312.4(d).

2. Reversion to an Earlier Tariff for Rate Calculation

Riss's final argument grounded in *American Trucking* is based on the proposition that where a tariff is retroactively rejected and deemed void *ab initio*, the tariff in effect prior to the rejection becomes the applicable tariff for the period during which the motor carrier charged rates contained in the rejected tariff. *American Trucking*, 467 U.S. at 358. Riss contends that if ICC RISS 501-B is rejected for a lack of participation in ICC HGB 101-B, it should nonetheless be permitted to calculate undercharges based on ICC RISS 501-B and its apparently proper earlier participation in ICC HGB 100-A. Riss's argument is premised on substituting an earlier issue of HGB's tariff, which was in effect at the time when Riss was listed as a participant in HGB's tariff, for the issue of HGB's tariff that was in effect during the period when Riss was not listed as a participant.



This argument is mere sophistry. Section 1312.4(d) does not operate in the present case to void the latter issue of HGB's tariff; rather, section 1312.4(d) operates to declare Riss's own tariff. ICC RISS 501-B, void. We also note that, even had Riss proffered evidence of the existence of a Riss tariff preceding ICC RISS 501-B on which to base a calculation of rates, section 1312.4(d) does not render the tariff in question void *ab initio* in this case as the remedy under scrutiny did in *American Trucking*. Rather, section 1312.4(d) declares Riss's tariff void only from the moment in 1985 when Riss failed to maintain the necessary effective power of attorney. Because Riss's tariff is not void *ab initio*, there is no reason, as there may have been in *American Trucking*, to look to an earlier tariff for rate calculation.

In a broad sense, Riss argues that *American Trucking* requires it be allowed to calculate undercharges based on rates contained in whatever Riss tariff most recently complied with ICC regulations prior to the voiding. In the present case, however, those rates appear to be the very same rates contained in the void tariff, and Riss would consequently end up with exactly what it is prohibited from seeking under the void tariff itself. We therefore conclude that Riss's position is untenable because it would completely vitiate the remedial enforcement power contained in section 1312.4(d), a power we hold to be a proper exercise of the ICC's discretionary authority to nullify tariffs.

## C. SUBSTANTIAL COMPLIANCE

Riss contends that ICC RISS 501-B should not be voided because is is in substantial compliance with ICC regulations and it therefore "trumps" section 1312.4(d) under the filed rate doctrine. Citing *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304, 1308 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 905 (1982), Riss asserts that a tariff on file with the ICC and not rejected at the outset is not to be disregarded or treated as nonexistent merely because of some element of substantive unlawfulness in the rate or some irregularity in tariff filing formalities. Here, however, we have neither. Instead, Riss's tariff was missing one entire and essential component of the two necessary to satisfy the fundamental purpose of tariff's, i.e., to disclose the freight charges due the carrier. *Jasper Wyman*, 1992 WL 17399, at 7.

Relying on the inference that at some time prior to HGB's cancellation on February 18, 1985. It had participated in HGB's distance guide tariff, Riss seems to argue that its former participation in the HGB tariff conferred upon it a right of perpetual participation. However, it is undisputed that Riss never transmitted any distance tariff to the Commission itself after HGB's cancellation, nor did it participate in the distance guides filed by any other carrier or agent. Consequently, Riss had no effective tariff by which any shipper or the Commission could ascertain its transportation charges. Riss's tariff, therefore, did not substantially comply at any time relevant to this case.



## D. REMAND FOR THE FIXING OF A REASONABLE RATE

Riss contends on appeal that in any event is is entitled under 49 U.S.C.A. section 10701(a) to receive a reasonable rate for its services, which in this case allegedly may be more than the negotiated rate it received under the contract. It asserts, therefore, that if its tariff is deemed void pursuant to section 1312.4(d), then this court should remand the case to the district court with instructions to refer the case to the ICC to determine the reasonable rate to which it is entitled. We note that Riss's reading of section 10710(a) is questionable. We decline, however, to address this argument as it was not raised in the district court. *Newark Morning Ledger Co. v. United States*, 539 F.2d 929, 932 (3d Cir. 1976).

## IV. CONCLUSION

We hold therefore that the ICC had the power to promulgate 49 C.F.R. section 1312.4(d) declaring void as a matter of law a tariff that is not in compliance with it. Riss's tariff ICC RISS 501-B failed to comply with this regulatory section, and was therefore void, at the time Riss performed the services at issue in this litigation. Consequently, although the filed rate doctrine mandates that carriers charge and shippers pay only the duly filed rate, Riss's purported tariff cannot be the basis for the computation of freight undercharges for services provided subsequent to the time it became void.

Accordingly, the summary judgment of the district court in favor of K Mart will be affirmed. Costs taxed against the appellant in favor of K Mart will be affirmed. Costs taxed against the appellant.

A True Copy:
Teste:
*Clerk of the United States Court of Appeals*
*for the Third Circuit*